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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 04 2009

SRC 07 800 25579

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a research associate at Macrocyclics Inc., Dallas, Texas. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 28, 2007. In a statement accompanying the initial filing of the petition, the petitioner stated:

> I am currently a key researcher in the Research and Development Division at Macrocyclics Inc., Dallas, TX, spearheading three vital investigations. One project is to develop novel[] bifunctional chelates for targeted nano-particle applications. . . . The project includes multi-step synthesis and characterization of lanthanide chelates which will be used in the pre-clinical development of new PARACEST contrast agent

> formulations. The second project involves the creation of ligands that are largely used by university and company research labs which are looking to create novel drugs to target cancer treatment or diagnosis. The third project . . . is to develop and make available chelates that have performance features such as high efficiency radiolabelling at room temperature while maintaining stability comparable to industry standard chelates. . . . In general for all the projects, I am in charge of planning and conducting synthetic organic and inorganic chemistry transformations, carrying out analytical characterization of intermediates and final products . . . , consulting primary literature relevant to the projects and keeping accurate records of the progress of my work.

The petitioner stated that he "served as an Adjunct Instructor of Organic Chemistry at Mountain View College, Dallas, TX. . . . Furthermore, I served as instructor of GED Preparation in Spanish through Continuing education program at the same college. Spanish GED is a crucial educational step for many Spanish-speaking students." He asserted: "my role as a teacher at the college level is [of] extreme importance for the US, since I am training and preparing young citizens for their careers. Critical budget shortages and an overworked full-time faculty have created opportunities in higher education for private citizens to function as part-time professors." Classroom instruction generally lacks national scope. *Cf. Matter of New York State Dept. of Transportation* at 217, n.3. Several of the petitioner's assertions about education are general, and apply to all competent teachers. As such, they address the intrinsic merit of teaching, but they do not distinguish the petitioner from others performing the same tasks.

The petitioner has written published articles in his field, but the record does not establish the impact of those articles. The petitioner submitted what he described as "Search Results from ISI Web of Knowledge database citing the research papers." This printout shows that the database includes two of the petitioner's articles, but it is not clear whether it indicates that other researchers have cited the petitioner's work in their articles. The printout shows the number "2" next to one listing, and the number "1" next to another, but from the formatting of the printout, we cannot determine whether these numbers refer to citations of the articles.

The petitioner submitted letters from numerous witnesses, including "current collaborators, colleagues, and others." We will discuss examples of these letters below. A number of the witnesses (including a dentist and a missile defense research analyst) do not work in the petitioner's field. The petitioner asserted that this diversity of witnesses demonstrates the breadth of his recognition, but the petitioner did not explain how these individuals have the standing or expertise to attest to the merits of the petitioner's work as a chemist.

Several of the letters are general letters of recommendation, with little information about the petitioner's specific achievements that set him apart from others in his field. For example, [redacted] of Mountain View College stated that the petitioner "has demonstrated exemplary chemical knowledge and scholarship. . . . He is well organized, patient and dependable." Vague and general letters of this sort offer little useful information. Other letters address the merits of a particular area of endeavor, without addressing the petitioner's individual talents at all. [redacted], for instance,

provided brief comments "regarding the use and worthiness of magnetic resonance imaging." Some letters are not letters of recommendation at all, but apologies for not providing such letters. A District Court judge explained "[t]he North Carolina Code of Judicial Conduct prohibits judges from lending the prestige of the office to advance the private interests of others," and an aide to a Texas state representative informed the petitioner that the official does not know the petitioner and therefore "is not able to prepare a letter of recommendation."

The most substantive letters are from officials of Macrocyclics and collaborators in the petitioner's current work. [redacted] Director of Operations at Macrocyclics and a Professor at the University of Texas at Dallas, stated:

> [The petitioner] has been under my direct supervision for the past year.
>
> In his past research experience, he designed and synthesized novel compounds with applications in radiopharmaceutical imaging and cancer therapy. This level of accomplishment clearly demonstrates a high degree of expertise and maturity which is necessary and valuable to both industry and academics in the United States. [The petitioner's] skill set has allowed him to make valuable contributions to his current project in which he designs and synthesizes new bifunctional chelates for targeted nano-particle imaging applications. This high profile project between Washington University and Macrocyclics will be instrumental in establishing future studies leading to commercialization.

[redacted], Associate Professor at Washington University in St. Louis, Missouri, offered more details about the project mentioned by [redacted]

> Under the supervision of [the petitioner] has been responsible for performing advanced organic syntheses of highly novel, PARACEST chelates . . . to detect, characterize, and treat cancer in its most nascent and vulnerable stages. . . . The synthetic and nanotechnology work performed by [the petitioner] is highly specialized and only a few laboratories are able to contribute similar research worldwide. . . . Because of the rarity of scientists in the United States with [the petitioner's] skills and experience, we consider ourselves very fortunate to have established his collaboration, which we hope will continue long into the future.

University of Texas Professor [redacted], Scientific Founder of Macrocyclics, stated:

> I can assure you that talented, young chemists like [the petitioner] are rather difficult to find in the United States currently because so few individuals are being trained. This makes him rather valuable to the United States research community in the field of synthetic chemistry.

> . . . [The petitioner] was chosen as an employee of Macrocyclics one year ago because of his extensive training in organic synthesis he received during his PhD training. . . . [The petitioner] is an important contributor to the efforts at Macrocyclics to invent new molecules and techniques that generally promote new discoveries in the medical field.

On October 17, 2008, the director issued a request for evidence, instructing the petitioner to submit documentary evidence of his impact on his field. In response, the petitioner submitted background information about Macrocyclics and its grant funding. These materials do not address the question of why it is in the national interest for the petitioner, rather than another qualified researcher, to work on the funded project at Macrocyclics. The petitioner stated:

> Another way to look at the impact of my research and work would be by checking into the scientific papers published during the last two years that claimed the use of compounds made by Macrocyclics. It is important to add that since the company is small, the work and contribution[s] of its members have a tremendous impact on its overall performance. . . . The common feature to highlight about these research papers is that without the compounds we made at Macrocyclics such studies could not take place.

The petitioner did not show that Macrocyclics was unable to produce anything for sale prior to the petitioner's arrival; that he was personally responsible for every product subsequently developed; or that Macrocyclics was the only possible source for the compounds used in the published research. Therefore, we cannot be persuaded by the assertion that the petitioner deserves indirect credit for every published experiment that involved Macrocyclics products.

The petitioner also submitted new witness letters. Several of the witnesses (and the petitioner himself) referred to the petitioner's work at Macrocyclics in the past tense, suggesting that the petitioner no longer works there. [redacted], Assistant Professor at the University of Texas Southwestern Medical Center (UTSMC), Dallas, "got to know [the petitioner] through a collaborative project in 2006, for which [the petitioner] was directly responsible at Macrocyclics Inc." [redacted] described this project in technical detail, stating "we are about to move this exciting research to diagnostic PET imaging of cancer. [The petitioner] made tremendous contributions to our current DOTA-related projects in collaboration with Macrocyclics Inc."

[redacted], Assistant Professor at UTSMC, stated: "I have known and interacted with [the petitioner] since 2006 when he interviewed for a Research Associate position at Macrocyclics. At that time I was working there as a Senior Research Scientist." Nevertheless, the petitioner listed [redacted] among "people that I do not know and/or have not work[ed] with them." Regarding the petitioner's work, [redacted] stated:

> At Macrocyclics [the petitioner's] role included the optimization of PARACREST chelates for targeted perfluoro nanoparticle formulations, the synthesis [of] DOTA-intermediates for solid phase peptide synthesis and the development of novel bifunctional chelators for copper(II)-radiopharmaceuticals. . . . [The petitioner's]

background and training enabled him to be very productive and to make important contributions to developing these new drugs and imaging agents.

Georgetown University Assistant [redacted] stated that his laboratory "decided to purchase [certain] compounds from Macrocyclics, Inc." after attempting "with limited success" to synthesize the compounds themselves. [redacted] asserted: "The science that [the petitioner] has developed and continues to investigate strongly impacts the chemistry of Molecular Medicine."

[redacted] of the University of Dallas stated: "I have only known [the petitioner] since August 2008 when I hired [the petitioner] as an affiliate assistant professor at the University of Dallas." [redacted] credited the petitioner with "significant contributions in the area of macrocyclic compounds," but did not elaborate. Other University of Dallas faculty members asserted that the petitioner has performed well in his position there. It is not clear whether this new position is in addition to, or instead of, his prior position at Macrocyclics.

With respect to the citation of his work, the petitioner submitted printouts from various databases. One printout showed that one of his articles was cited three times (including one self-citation), and another was cited four times (including two self-citations). A third article was cited once, in a review article. The petitioner did not show that this is a particularly significant citation rate in his specialty.

The director denied the petition on December 3, 2008, stating that the petitioner had failed to establish that his work in chemistry had had a significant impact. On appeal, counsel asserts that *Matter of New York State Dept. of Transportation* "imposes criteria on the national interest waiver process that are ultra vires of the statute." The statute itself offers negligible guidance as to such criteria, and therefore any kind of specific requirements will not be mirrored in the statutory language.

Congress is presumed to be aware of existing administrative and judicial interpretations. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). We note that, after the issuance of *Matter of New York State Dept. of Transportation*, Congress amended the Act to make the waiver available to certain physicians. Therefore, not only was Congress aware of the precedent decision, but Congress also acted to change the statute in response to that decision. To date, more than a decade after the issuance of the precedent decision, Congress has made no further changes to the statute with regard to the national interest waiver. There is, therefore, no reason to conclude that *Matter of New York State Dept. of Transportation* is in serious opposition to Congressional intent.

Counsel asserts that, in response to the director's request for evidence, the petitioner "provid[ed] detailed evidence of his unique contributions to the field." The petitioner, in that submission, provided more details about his work, but he did not establish how his contributions set him apart from others in the field. Witness letters and other exhibits showed that the petitioner developed compounds that other laboratories purchased and used, but the petitioner has not shown that this makes him at all unusual in his field. His employer, Macrocyclics, exists for the purpose of formulating and selling certain chemical compounds. That the petitioner acts within those parameters is a mark of professional competence rather than one of distinction. By the same token,

identification of Macrocyclics' clients does not distinguish the petitioner from others who, like him, engage in the business of selling chemicals to laboratories. Counsel asserts that "[r]esearch laboratories around the country have benefited from [the petitioner's] work," but the petitioner does not demonstrate that these clients had no other source for the materials they purchased from Macrocyclics.

Counsel quotes [redacted] earlier observation that the petitioner "has produced several PARACEST chelates for research evaluation. A major chemical company working on the same project only produced one chelate over two years." This anecdotal assertion about an unnamed chemical company, with no discussion of potential complicating factors, is not sufficient to qualify the petitioner for the special benefit of the national interest waiver.

Counsel quoted another witness's assertion that the petitioner has written "several well received technical papers." That witness, [redacted], is the co-author of many of those papers. He did not specify in what sense these minimally-cited papers were "well received."

Counsel cites an unpublished appellate decision in which the AAO reversed the denial of a petition in which "the number of citations has been relatively small" but "the letters and evidence of record demonstrate recognition among the community of experts in the field." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, there is a difference between "recognition among the community of experts" and client satisfaction.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.